Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-462

TIMOTHY RICHARD HOUDE and
BARRY ALAN LABRECQUE,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, TIMOTHY RICHARD HOUDE and BARRY ALAN LABRECQUE, respectfully pray a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 11, 1979.

## CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Texas, El Paso Division, United States District Judge John H. Wood presiding, entered a judgment of conviction against the Petitioners herein. This conviction was made the subject of an Appeal under 28 U.S.C. §1291 to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed on June 11, 1979. This opinion was reported as *United States v. Houde*, 596 F.2d 696 (1979), and reproduced herein as Appendix A. The Court of Appeals subsequently denied Petitioners HOUDE and LABRECQUE's Petition for Rehearing on August 20, 1979. This result was not reported, but is reproduced herein as Appendix B.

## JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals denied a Petition for Rehearing *En Banc* on August 20, 1979.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

## QUESTIONS PRESENTED

1. Whether a Trial Court is required under the principles of due process and fundamental fairness to grant a Continuance or to impose sanctions, or to



fashion some other remedy after the Government intentionally and materially violated a Pre-trial Discovery Agreement between itself and a criminal Defendant.

2. Whether a Trial Court is required under the principles of due process and fundamental fairness to grant a criminal Defendant the opportunity to place proof of prejudice in the record regarding the prejudice to his Defense caused by an intentional and material violation of a Pre-trial Discovery Agreement by the Government.

3. Whether an Appellate Court must consider a Trial Court's stipulation as to the fact that prejudice inured to the Defendant through the intentional acts of the Government is breaching a Pre-trial Discovery Agreement.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment V provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law; . . .

2. The United States Constitution, Amendment VI provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATEMENT OF THE CASE

The Petitioners, TIMOTHY RICHARD HOUDE and BARRY ALAN LABRECQUE, were arrested on the 26th day of April, 1978, which was the date of the offenses set forth in the Indictment:

THE GRAND JURY CHARGES:

### FIRST COUNT
(21 U.S.C. §846)

That commencing on or about April 1, 1978 and continuously thereafter up to and including on or about April 26, 1978, in the Western District of Texas, Denver, Colorado, and elsewhere, Defendants WILLIAM DUDLEY CONNELL, MARIO CENTENO, TIMOTHY RICHARD HOUDE and BARRY ALAN LA BRECQUE, wilfully, knowingly and unlawfully conspired, combined, confederated and agreed together and with each other, and with others whose names to your grand jurors are unknown, to commit offen-



ses against the United States, in violation of 21 U.S.C. §846, that is to say, they conspired to possess Cocaine, a Schedule II Controlled Substance, with intent to distribute same contrary to 21 U.S.C. §841(a)(1);

* * *

### SECOND COUNT

(21 U.S.C. §841(a)(1)
and 18 §2)

1. That on or about April 26, 1978, in the Western District of Texas, Defendants WILLIAM DUDLEY CONNELL and BARRY ALAN LA BRECQUE unlawfully, knowingly and intentionally distributed a quantity of Cocaine, a Schedule II Controlled Substance to Detective Gary Graham, who was acting in an undercover capacity.

2. Defendants MARIO CENTENO and TIMOTHY RICHARD HOUDE aided, abetted, counseled, induced and procured the commission of the offense alleged above. (RI 1-2)

The record reflects that they were arraigned before a magistrate on the 27th day of April, 1978, and that a preliminary hearing was set by the magistrate for May 5, 1978, (RI Docket Sheet). This hearing was never held because the Government secured an Indictment

against the Petitioners on the day before May 4, 1978, (RI Docket Sheet). On the 12th day of May, 1978, the Petitioners were arraigned on an Indictment, (RI 1-2), charging them with intent to distribute (21 U.S.C. §846) and one count of distributing cocaine (21 U.S.C. §841); and they received a trial setting for June 5, 1978, (RI Docket Sheet). Pursuant to their preparation for trial, TIMOTHY RICHARD HOUDE and BARRY ALAN LABRECQUE entered into an "Omnibus Agreement" with the United States of America, (RII 4-28), as is the practice in the Western District of Texas. This Agreement, which contains numerous provisions, committed the parties to the following:

> "3(a) The parties agree to exchange all statements [Per 18 U.S.C. §3500(e)] and reports of statements (including written reports in investigator's interviews) of all witnesses they expect to call in its case in chief. If any, will provide five days prior to trial. (RII 5)

and

> 14(j) The parties acknowledge that any duty to disclose imposed herein is a continuing duty, and that any discoverable evidence or material becoming known during the pendency of this case will be promptly disclosed to the opposing party.
>
> /s/ CHARLES LOUIS ROBERTS
> Attorney for Defendant
>
> /s/ JAMES W. KERR, JR.
> Attorney for Government"



On Friday, June 2nd, Defense Counsel called the Court in San Antonio where he was referred to the Court's clerk, Mr. Don Reser, at his residence number. Defense Counsel notified Mr. Reser that either sanctions or a continuance would be needed because of gross violations of the pre-trial discovery agreement on the part of the Government, (RI 29-30, 45).

Before the docket call on Monday, June 5th, Defense Counsel filed two lengthy sworn motions which set out in some detail the events and acts relied upon in requesting sanctions or a continuance, (RI 23-39, 40-56).

After filing their motions, the Appellants made the following announcement at the morning docket call:

> MR. ROBERTS: Charles Roberts with Mr. Abraham for the Defendants, Houde and LaBrecque, and we are not ready for trial on the grounds stated in our Motion for Sanctions and Renewed Motion for Continuance. (RIII 2)

The Government contended it was not bound by the agreement, and admitted that the violation was intentional:

> MR. KERR: But that's the reason is because that's one of the conditions under which I got the statement, that we would keep his cooperation with the Government secret until

> the time that it had to be exposed. Omnibus does not require me to expose all of my witnesses to harassment or to be approached by anyone who wishes to approach them with a signed copy of their statements. (RIII 7-8)

After learning that the Court intended to overrule *both* the Motion for Sanctions and the Motion for Continuance, Defense Counsel requested an evidentiary hearing on the Motion for Continuance, (RIII 12). In explaining what he wished to prove at an evidentiary hearing, Defense Counsel recounted the following basic facts: (1) That the Government had violated its agreement with Defense Counsel to supply them with names and statements of witnesses five days prior to trial, (RIII 8-11, 13); (2) That the Defense had relied on this agreement, and thus was not prepared for trial, (RIII 8-11, 13); and (3) That this lack of preparation was the result of "purposeful and intentional deceptive practices of the United States Attorney," (RIII 13). To which the Court responded:

> THE COURT: I'll overrule the motion, gentlemen. I'll stipulate that the evidence is going to show everything you say it will. And I will agree that that's what it's going to show. Gentlemen, we will proceed to trial. This will be jury selection No. 1.
>
> Be back at 1 o'clock and we will select a jury. (RIII 14)



The Assistant United States Attorney, Mr. KERR, did not indicate any objection to this stipulation, nor to this resolution of the matter, (RIII 14). Subsequently, the jury was picked and sworn (RIII 45-46), and, shortly thereafter, the United States made its opening statement, (RIII 46, 53).

At trial, the Government began its case with the two witnesses WILLIAM DUDLEY CONNELL and Miss JODY LIGGIN, whose statements were withheld from Defense Counsel. Their testimony, which formed the bulk of the Government's case, was as follows:

**1. The Direct Testimony of WILLIAM DUDLEY CONNELL.**

In his *direct examination*, Mr. CONNELL testified to the following extraneous and out of town offenses:

a. *The Virginia Matter.* Mr. CONNELL testified that in the fall of 1977, he had prior dealings with TIMOTHY HOUDE in which he fronted Mr. HOUDE some four ounces of cocaine which Mr. HOUDE took to Virginia, and that he received a quantity of "pills" from TIMOTHY HOUDE when he returned from Virginia.

b. *The Denver-Seattle Matter.* Mr. CONNELL further testified that in March, 1978, he had conversations with BARRY LABRECQUE in which Mr. LABRECQUE said he had a connection for a large amount

of cocaine, (RIII 69-79). According to Mr. CONNELL, he later spoke with TIMOTHY HOUDE, and pursuant to this, he picked up a pound of cocaine at Mr. HOUDE's house on Palmary Street, (RIII 70-71), which Mr. CONNELL tested by tasting and inhaling (RIII 71). Mr. CONNELL related that he had the cocaine sent to Seattle through Denver under the care of a "friend" of his, named JODY LIGGIN, (RIII 71). Mr. CONNELL further testified that pursuant to his plans, Miss LIGGIN went to Denver and met with an individual known as PAUL TAYLOR, but they did not continue to Seattle because something happened to the cocaine; specifically, some of the cocaine was missing and some had been adulterated, (RIII 72). Because of this, Mr. CONNELL flew to Denver to escort Miss LIGGIN back to El Paso, (RIII 72-77), on March 22, 1978, (RIII 76).

Mr. CONNELL related that when he returned, Mr. LABRECQUE and Mr. HOUDE came to his house; were told of the problem; and, in turn, told Mr. CONNELL that because the cocaine had been "fronted," money was still owed on it, (RIII 78). Mr. CONNELL testified that the "concern at the time" was to raise money to pay back the "Mexicans," who were the source of the cocaine and to whom the money was owed, (RIII 79-80). Mr. CONNELL testified that he was later informed that Mr. HOUDE and his automobile were taken to Mexico or kidnapped by the Mexicans, and that only through he and Mr. LABRECQUE raising a sum of money were they able to secure his release, (RIII 81-82). The "Mexicans," however, did retain



the car, (RIII 82), and the "threat against their lives" remained, (RIII 81).

c. *Other Testimony.* The remainder of Mr. CONNELL's direct testimony dealt with offenses described in the indictment.

**2. The Direct Testimony of JODY LIGGIN.**

a. *The Denver-Seattle Matter.* Miss LIGGIN testified that she did make the trip to Seattle in March at Mr. CONNELL's instructions, that the deal fell through, that somehow the cocaine was adulterated, and that she returned to Denver where Mr. CONNELL escorted her home, (RIII 159-161). Miss LIGGIN further testified that after the Seattle trip, when Mr. LABRECQUE and Mr. HOUDE visited Mr. CONNELL at his house, she overheard "slightly raised voices," (RIII 167). She then testified that after Mr. LABRECQUE and Mr. HOUDE left, Mr. CONNELL told her that the "coke" had been adulterated.

b. *Other Testimony.* Miss LIGGIN's entire testimony was focused on this above extraneous offense, with no testimony dealing with the offenses described in the indictment. (RIII 155-181).

**3. The Testimony of the Drug Agents.**

Detective GRAHAM, a Colorado Drug Agent, testified that he became involved in the case on April 10,

1979, (RIII 182), while investigating one "Dudley Connell" of El Paso, Texas. During their negotiations between the Drug Agent and Mr. CONNELL, Mr. CONNELL mentioned dealing with a person who he referred to "only as Barry," (RIII 185-186). After an aborted "buy" of cocaine, which Mr. CONNELL failed to deliver, (RIII 186-190), another "buy" was set up. After contacting the local Federal Drug Agents, Detective GRAHAM flew to El Paso, (RIII 191-192), and met with Mr. CONNELL. Subsequently, he and Mr. CONNELL went to a location called "Ray's Bassett Burger" in a "rented recreational vehicle" of Mr. CONNELL's, (RIII 193). As to the events there, Detective Graham gave the following account: (1) Mr. CONNELL and he arrived and parked south of the Bassett Burger location, (RIII 194); (2) Mr. CONNELL left their recreational vehicle and went into "Ray's" to talk with BARRY LABRECQUE who was inside, (RIII 194); (3) Mr. CONNELL came back and said that the Mexicans were "slow," (RIII 195, 200); (4) Mr. LABRECQUE left the restaurant and went up to a brown Ford beside the restaurant and at that time the brown Ford left the area; (5) Detective GRAHAM briefly left the recreational vehicle to talk with Detective O'DELL, and when he returned, Mr. CONNELL was setting up some "triple beam" scales, (RIII 197); (6) Mr. CONNELL left the recreational vehicle again to get a hamburger and returned with the hamburger, (RIII 198); (7) Mr. CONNELL stated to Detective GRAHAM that the Mexicans would first go to "Barry," and pointed at the blue Volvo, (RIII 198); (8) BARRY LABRECQUE exited the



blue Volvo and made a phone call, (RIII 199); (9) Within a minute, the "brown Ford" drove up again, and MARIO CENTENO and a Mr. ONTIVEROS got out and walked up to the blue Volvo, (RIII 200); (10) MARIO CENTENO attempted to pull something out of his pants, but Mr. LABRECQUE waved him off, (RIII 201); (11) Mr. CENTENO, Mr. ONTIVEROS, and Mr. LABRECQUE e. tered the restaurant where Mr. CENTENO and Mr. LABRECQUE entered the restroom, (RIII 201); (12) Mr. CONNELL exited the recreational vehicle and spoke to TIMOTHY HOUDE in the blue Volvo, (RIII 201-202); (13) Detective GRAHAM again exited the recreational vehicle to talk with Detective O'DELL, and upon his return to the recreational vehicle found BARRY LABRECQUE with DUDLEY CONNELL inside, (RIII 203); (14) At that time, Mr. LABRECQUE apologized to me for the holdup, relating that his was the land of manana and he was sorry that it was taking so long. And he, in the same manner as I observed Mr. CENTENO, he reached up — reached down, pulled up his shirt, reached into his pants and pulled out a baggie of what he represented to be cocaine, (RIII 203); (15) Detective GRAHAM tested the cocaine, then left the vehicle to get the "money" and shortly thereafter gave the bust signal, whereupon Mr. CONNELL and Mr. LABRECQUE were arrested in the recreational vehicle, Mr. CENTENO and Mr. ONTIVEROS were arrested in the brown Ford, Mr. HOUDE was arrested in the blue Volvo, (RIII 204-206). Upon questioning, Detective GRAHAM admitted:

Q. All right. Now, have you ever, ever before April 26th talked to Barry LaBrecque?
A. I have not talked to him in person.
Q. Have you ever talked to Mr. Houde prior to April 26, 1978?
A. No sir. (RIII 208-209).

Another Agent, Special Agent SEARS of the Drug Enforcement Administration, testified that he had observed a blue Volvo bearing BARRY ALAN LABRECQUE and TIMOTHY RICHARD HOUDE, arrive a few minutes before the arrival of the recreational vehicle carrying Mr. CONNELL and Detective GRAHAM, (RIII 253-264).

Following the final argument and the Court's charge, the jury retired on June 7, 1978, to deliberate, and returned some four hours later with verdicts of guilty as to the First Count (conspiracy) and as to the Second Count (distribution), (RII 96); as to both Defendants, and accordingly, the Petitioner, TIMOTHY RICHARD HOUDE, was sentenced on July 12, 1978 to: SEVEN YEARS imprisonment and SEVEN YEARS SPECIAL PAROLE on Count 1; SEVEN YEARS imprisonment and SEVEN YEARS SPECIAL PAROLE on Count 2. Count 2 is to run consecutively to Count 1. TOTAL SENTENCE: 14 years to serve and 14 years special parole. (RII 97). To which, Notice of Appeal was filed the next day on July 13, 1978, (RII 98). The Petitioner, BARRY ALAN LABRECQUE, was sentenced on July 12, 1978, to: NINE YEARS imprisonment and



NINE YEARS SPECIAL PAROLE on Count 1; NINE YEARS imprisonment and NINE YEARS SPECIAL PAROLE on Count 2. Count 2 is to run consecutively to Count 1. TOTAL SENTENCE: 18 years to serve and 18 years special parole, (RI 78). To which, Notice of Appeal was filed the next day on July 13, 1978, (RI 79).

The United States Court of Appeals affirmed these convictions and sentences in *United States v. Houde*, 596 F.2d 696 (5th Cir. 1979), entered on June 11, 1979. That opinion reasoned that in the absence of prejudice demonstrated in the record, the error was not reversible, *Houde, Supra.*, at 701. The panel opinion in reciting the facts, however, pointedly omitted the request for an evidentiary hearing by Counsel, (RIII 12, et seq.), and the trial Court's denial of that request by stipulating to the prejudice caused by the Government's intentional act, (RIII 14).

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I

**Whether A Trial Court Is Required Under The Principals Of Due Process And Fundamental Fairness, To Grant A Continuance Or To Impose Sanctions, Or To Fashion Some Other Remedy After The Government Intentionally And Materially Violated A Pre-Trial Discovery Agreement Between Itself And A Criminal Defendant.**

Before turning to legal argument, the Petitioners would first summarize the factual setting of their due process and fundamental fairness claim. First of all, let us remember that this was an extremely speedy trial, barely over thirty days from offense to indictment, (RI Docket Sheet), and less than thirty days from arraignment to trial, (RI Docket Sheet). Secondly, let us recall that aside from the actual delivery of the contraband by Petitioner LABRECQUE, which was witnessed by Federal Agents, (1) Petitioner HOUDE's involvement in that delivery; (2) Petitioner LABRECQUE's involvement in a narcotics conspiracy as against involvement in a simple delivery, [see *United States v. White*, 569 F.2d 269, (5th Cir. 1978)]; and (3) Petitioner HOUDE's involvement in that same conspiracy, all rested on the testimony of WILLIAM DUDLEY CONNELL, (RIII 66-95), and of his girlfriend, JODY LIGGIN, (RIII 155-172), both confessed drug dealers who had made a deal with the Government. It is in this light that the Government's breach should be viewed.

In this case we have a breach of a signed Pre-trial agreement between the Petitioners and the United States. This fact was admitted on oral argument before the Court of Appeals by the United States. The breach was an intentional act on the part of the Government. Indeed, the Prosecutor admitted this very fact when he explained his reasons for withholding the statements from the Defense, (RIII 7-8), i.e. protecting his witnesses from "harassment," (RIII 8). It is the Petitioners' position that this agreement bound the



sovereign and in so doing invoked due process and fundamental fairness principles implicit and explicit within the Bill of Rights of the United States Constitution, *United States v. Millet*, 559 F.2d 253 (5th Cir. 1977), citing *Santobello v. New York*, 404 U.S. 257, (1971). In *Millet*, the Fifth Circuit so held, *Millet, Supra.*, at p. 257. However, the panel's opinion in *Houde* stepped back from *Millet* and analyzed the above problem as a mere procedural defect, *Houde*, 596 at 701 specifically:

> The argument that the failure to comply with the omnibus agreement constitutes a denial of due process is based on a faulty premise. As we have already said, no prejudice has been shown. Even when there has been non-compliance with the statutory mandate of the Jencks Act, this is not per se a violation of the constitution. Prejudice must be shown. This applies a fortori to violation of an agreement. *Houde, Supra.*

Ignoring even the contract principles posited by *Santobello*, 404 U.S. at 262, the Fifth Circuit added:

> In any event, the statements of the witnesses were Jencks Act material which, in the absence of the omnibus agreement, Government counsel would not have been required to furnish until the witnesses had testified. See 18 U.S.C. §3500(b). *Houde, Supra.*

A. *Contract Principles.*

The signed plea bargain here may be seen as a contract between the Government and a Defendant, similar to that involved in plea bargaining, *Santobello, Supra., Cooper v. United States,* 594 F.2d 12, 15-16, (6th Cir. 1979). Here, Defense Counsel signed the agreement, which included among other things: (1) eschewing certain defenses, (2) adopting and giving certain other defenses, (3) waiving objections, waiving hearings, and (4) obligating himself to provide the Government with a witness list together with statements, if any, five days prior to trial, (RII 4-28). The Defense list of witnesses, there being no statements, was forwarded to the United States Attorney five days prior to trial. (See documents attached to Motions for Sanction and for Continuance, RI 23-39, 40-56). This much according to *Santobello,* 404 U.S. at 262, and *Cooper,* 594 at 15-16, would bind the Government so that it would be required to fulfill its agreement or, at the very least, place the Defendants in the position they would have been in had they not relied on the agreement.

B. *Fundamental Fairness and Due Process.*

The unfairness of the all-powerful Government intentionally breaking its word with a relatively insignificant criminal Defendant need not be elaborated upon. His bargaining position is so slight as to be meaningless. If the trial Court is unmoved, then he is truly lost. There is no remedy even as to the deceiving Prosecutor himself; of course, he is immune, *Imbler v. Pachtman,* 424 U.S. 409 (1976).



Additionally, we must recognize the need for enforcing these agreements not only because of fairness to the Defendant, but to protect and promote these agreements as methods of avoiding needless waste of time and expense by Court and Counsel. If these agreements are not enforceable by a Defendant, they will disappear from the scene. No Counsel will risk a serious malpractice suit by naively trusting in a mere signature of a United States Attorney. In *Jackson v. Denno,* 378 U.S. 368, 386, (1964) this Court talked about:

> "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Jackson v. Denno, Supra.,* quoting *Spano v. New York,* 360 U.S. 315, 320-321 (1959)

The situation here is similar. The Government deceives the Defendant, and then asks the Court to ignore its wrongdoing, if not approve it. There may be some sort of superficial logic in the statement that the United States should be allowed to use dishonesty in prosecuting dishonesty, but our system can not endure it. The effects of such practices on innocent and guilty defendants alike can only destroy any rehabilitative aspects that our Criminal Justice System might possess. How can there be any respect for a State which uses the same dubious methods which brought many of its criminal defendants to bar.

C. *Effective Assistance of Counsel.*

In analyzing a withdrawn plea bargain agreement, the Sixth Circuit in *United States v. Cooper, Supra.*, at 18-19, the Court remarked that because plea bargains were necessarily communicated through Counsel:

> For this reason, not only the credit and integrity of the government but those of his counsel are involved in a defendant's perception of the process.
>
> and,
>
> To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. (footnote omitted) *United States v. Cooper, Supra.*, at 18-19.

Here, we can imagine that Counsel informed his clients that in spite of the fact that they were being pushed to trial with barely a month's time, they would be receiving the statements of the Government's witnesses five days prior to trial, which would be a great help. We can also imagine Counsel informing his clients at trial that the Government had decided to cheat on



the agreement, and apparently the Court was going to let them get away with it.

D. *Remedies.*

It is the Petitioners' position that a breach of a discovery agreement between the Government and the Defendant should command much more attention than mere violations of discovery orders or procedural rules. These orders and rules are fashioned and are accorded such weight as the Court sees fit. However, by agreement both the Defendant and Government can go far beyond that which could be reached by any order or rule, such as when a Defendant waives a Constitutional right, etcetera. And it is not the Court's place to enforce the agreement from the standpoint that the Court perhaps would not have fashioned such an agreement, but simply to enforce it. Looking at violations of Pre-trial discovery orders, we first need to review the facts of this case.

The direct testimony of the two witnesses, Mr. CONNELL and Miss LIGGIN dealt with various matters which were not contained in the indictment, (See RI 1-2). These allegations included extraneous criminal activities on the "east coast," (RIII 68), Seattle, (RIII 71), Denver, (RIII 72); included extraneous substances, (RIII 69); included extraneous persons such as "PAUL TAYLOR," (RIII 71), "the Mexicans," (RIII 79), and "the buyers" (RIII 160); and included a time frame preceding the time set forth in the indictment by sev-

eral months, (compare RIII 68 with RI 1-2). In other circuits, the bare fact that these matters, substances, people, and times were extraneous to the indictment would constitute prejudice so as to compel a reversal when coupled with a discovery breach. *United States v. Roybal,* 566 F.2d 1109 (9th Cir. 1978). The Ninth Circuit stated:

> We cannot ignore the unfairness and potential prejudice to the defendant who must suddenly defend against evidence such as this. Similarly, we cannot ignore the unfairness and discourtesy to the trial judge who is suddenly faced with having to decide, on an incomplete record, whether trial should continue or whether the time and cost, theretofore expended, is to be wasted — with its obvious delays. *United States v. Roybal, Supra.*

Likewise, the Courts will enforce a discovery order *against* Defendants, *United States v. Nobles,* 422 U.S. 225 (1975). In *Nobles,* this Court approved the ultimate sanction, a Court's refusal to allow the witness to testify, where the Defense had failed to timely provide the Government with a report. There was no discussion in that case of whether lack of the report would have prejudiced the Government. If a mere Court's order may be enforced in such a fashion, then a solemn agreement between the Defendant and Government must be enforced or otherwise remedied. Here, instead of the faraway legions of police fighting crime in the



street, *Spano, Supra.,* we are dealing with an officer of the Court who can easily be reached and deterred from unseemly conduct, the Prosecutor. The integrity of the entire system is needlessly implicated by allowing such practices. Here, there are no strong, identified needs of society which demand that the Government have the right to deceive a Defendant through a faithless bargain. Thus, it is clear that an exercise of the supervisory powers of this Court is called for. Not only to assure fairness to these Petitioners, but also to insure that the system is perceived as fair.

## II

**Whether A Trial Court Is Required Under The Principals Of Due Process And Fundamental Fairness To Grant A Criminal Defendant The Opportunity To Place Proof Of Prejudice In The Record Regarding The Prejudice To His Defense Caused By An Intentional And Material Violation Of A Pre-Trial Discovery Agreement By The Government.**

Before trial, Counsel filed sworn affidavits and documents attesting to the breach of the agreement, (RI 23-39, 40-56), and requested that the Court allow him an evidentiary hearing to present evidence as to the breach and the resulting prejudice, (RIII 12, et seq.), which the trial Court avoided by the curious plot of stipulating to the breach and the prejudice, (RIII 14).

The Fifth Circuit's opinion ignored the Petitioners' request for an evidentiary hearing in its recital of the facts, *Houde, Supra.*, at 698-701, and its treatment of this issue, *Ibid.*, at 701. By refusing to allow such a hearing because it was stipulating to the facts, the trial Court foreclosed the Defense from placing Counsel and an investigator on the stand to testify as to what would have been done if there had been no discovery agreement on May 17th, and to what would have been done to investigate, verify and counter the statements had they been available five days prior to trial. Where constitutional rights are implicated and where the evidence is not suitable for presentation before the jury, this Circuit had previously held that such an evidentiary hearing must be held, *United States v. Gonzalez*, 548 F.2d 1185 (5th Cir. 1977); following *Jackson v. Denno*, 378 U.S. 368 (1964). Thus, the Petitioners were denied not only a remedy, but also a forum in which to present evidence of their injury.

## III

**Whether An Appellate Court Must Consider A Trial Court's Stipulation As To The Fact That Prejudice Inured To The Defendant Through The Intentional Acts Of The Government Is Breaching A Pre-Trial Discovery Agreement.**

Likewise, the Fifth Circuit ignored the Court's stipulation as to the Defendants' prejudice[1] as well as the

1 This fact of this stipulation was presented several times in Appellants' *Brief in Chief* and *Reply Brief*, and was mentioned so often in Oral Argument that the panel bade counsel not to refer to it again.



Government's acquiescence in that stipulation, (RIII 14; *Houde, Supra.*, at 698-701). Prior to the panel opinion, it was the law in that Circuit that stipulations of fact fairly entered into are controlling and conclusive with the Court's being bound to enforce them even if the Government is the party bound. *A. Duda and Sons Coop. Ass'n v. United States*, 504 F.2d 970 (5th Cir. 1974). Viewed in another manner, it is the law in every circuit that factual findings as to prejudice made by a District Court are controlling unless clearly erroneous. *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976).

## CONCLUSION AND PRAYER

Wherefore, the above premises considered, the Petitioners pray that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES LOUIS ROBERTS
Attorney for Petitioners
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

## CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioners, TIMOTHY RICHARD HOUDE and BARRY ALAN LABRECQUE, hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Jamie Boyd
United States Attorney
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Hemisfair Plaza
San Antonio, Texas 78206

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said Jamie Boyd, attorneys for said



Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of September, 1979.

JOSEPH (SIB) ABRAHAM, JR.
Attorney for Petitioners
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El Paso, Texas 79901
(915) 532-1601

CHARLES LOUIS ROBERTS
Attorney for Petitioners
505 Caples Building
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(915) 532-1601

## APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

versus

Timothy Richard HOUDE and
Barry Alan La Brecque,
Defendants-Appellants.

No. 78-5453

United States Court of Appeals
for the Fifth Circuit

June 11, 1979.

Appeals from the United States District Court for the Western District of Texas.

Before GODBOLD, Circuit Judge, SKELTON, Senior Judge*, and RUBIN, Circuit Judge.

SKELTON, Senior Judge.

In this case the appellants, Timothy Richard Houde and Barry Alan La Brecque, along with William Dudley Connell and Mario Centeno, were charged by indictment on May 4, 1978, in the Western District of Texas with conspiracy to possess cocaine with the intent to

* Senior Judge of the United States Court of Claims, sitting by designation.

distribute in violation of 21 U.S.C. §§841(a)(1) and 846. Appellant La Brecque was also charged with the completed substantive offense, and Appellant Houde, with aiding and abetting La Brecque's possession of cocaine in violation of 18 U.S.C. §2 and 21 U.S.C. §841(a)(1). After being convicted by a jury, Appellant La Brecque was sentenced to consecutive nine-year terms of imprisonment and nine-year special parole terms, and Appellant Houde received consecutive seven-year terms of imprisonment and seven-year special parole terms. They have both appealed their convictions.

The facts alleged in the briefs of the Appellants and the Government are substantially the same. We adopt the statement of facts in the Government's brief. This statement of facts shows that in March of 1978, William Dudley Connell, a travel agent in El Paso, Texas, and a co-conspirator in this case, was asked by Appellant La Brecque to find buyers for cocaine; La Brecque told Connell that he had connections with "the Mexicans" and could obtain large quantities of cocaine. A few days later, on March 20, 1978, Connell called Appellant Houde and told him he had found a purchaser. Appellant Houde responded that he had a pound of cocaine, and Connell went to Houde's house to get it.

After obtaining the narcotics from Houde, Connell sampled it by tasting and inhaling. The substance was cocaine. Connell packaged the cocaine in four plastic bags to be taken to Seattle for sale by his girlfriend,



Jody Liggin. The price was $24,000, and Connell was to pay this to Appellant Houde upon Liggin's return. Connell retained less than half of a gram of the cut cocaine from the pound he received from Houde.

The next day, Liggin flew to Denver where she was met by a friend of Connell's, and together they flew to Seattle. However, the expected purchase did not occur, and Liggin returned to Denver where she was met and escorted to El Paso by Connell. Upon reaching Connell's home in El Paso, Connell discovered that only three of the packages were in the same condition that they were in when he had packaged them. One package had been adulterated by some unknown substance, and some of the cocaine was missing from it.

Shortly after the couple returned to the house, Appellant Houde called trying to locate Connell. Although Liggin, at Connell's instructions, informed Houde that Connell was still in Denver, Appellants Houde and La Brecque appeared at Connell's house an hour later.

The three men had a serious conversation about the adulteration of the cocaine, because the cocaine had been delivered to them by the Mexicans without prepayment, and money was still owed on it. Each decided to raise as much money as he could to help pay the debt to the Mexicans. Although returning one package of the cocaine and the twenty grams of uncut cocaine to Appellants La Brecque and Houde, Connell gave two of

the three packages of cocaine to another individual and retained the small quantity that he had skimmed off the original pound.

Sometime thereafter, Appellant La Brecque informed Connell that Appellant Houde had been kidnapped by the Mexicans and that he and his car would be retained in Juarez, Mexico — the border town across the river from El Paso — until the $8,000 still owed the Mexicans was paid. Connell responded that he had received a call from a person he knew as Dave Anderson, seeking to purchase large quantities of cocaine, and this transaction would assist them to raise the money to get Houde released. However, the men managed to raise sufficient money to release Appellant Houde, although the Mexicans retained his car.

Connell was still anxious to deal with Dave Anderson of Denver and asked Appellant La Brecque to see if the Mexicans would provide them with a quantity of cocaine without prepayment to enable them to repay the balance due on the original cocaine transaction. Although Appellant La Brecque doubted that the Mexicans would agree, he said he would approach them. Reporting back, Appellant La Brecque stated the Mexicans would provide one pound of cocaine under very strict guidelines and would not allow the cocaine to leave their sight or possession until delivery.

About April 15, 1978, Connell flew to Denver and met with Dave Anderson, who in reality was Gary Lee



Graham, a narcotics detective working under cover with the Denver Police Department. Detective Graham and Connell discussed the details of the transaction with Graham negotiating to purchase three to four pounds of cocaine to be delivered in El Paso the following Tuesday. Connell informed Detective Graham that he had a Mexican connection that would deliver to "Barry" who in turn would supply the cocaine to him.

Returning to El Paso, Connell met with Appellant La Brecque to discuss the possibility of arranging the transaction by the following Wednesday. Appellant La Brecque informed Connell that he could get the cocaine and instructed him to arrange for Detective Graham to come to El Paso. After several telephone calls, Detective Graham arrived in El Paso on April 19, 1978. While there, Detective Graham refused to buy ¼ ounce of cocaine for $500, and negotiations for the delivery of the several pounds were unsuccessful; so, Graham returned to Denver.

Again, after numerous telephone calls, Detective Graham, accompanied by Detective John O'Dell, returned to El Paso five days later to finally buy the three to four pounds of cocaine. Detective Graham received assurances from Connell that he had a pound of cocaine in his possession before Graham left Denver and he informed Connell that he would have to return to Denver on the same day. Accordingly, Connell spoke to Appellant La Brecque, explaining that Detective

Graham would arrive at 3:45 p.m. and had to leave at 7:20 p.m., so the cocaine sale had to occur within that time frame.

When Detective Graham and Detective O'Dell arrived at the airport, surveillance agents observed Appellant Houde in the concourse where Graham's flight deplaned and at the lobby doors of the airport. However, it was Connell who met the detectives, taking Detective Graham to a local restaurant in a rented recreational vehicle. Detective O'Dell was to follow the men in a separate rented vehicle and used the opportunity to meet with local agents of the Drug Enforcement Administration to obtain a flash roll of $24,000.

Graham and Connell arrived at the restaurant at approximately 6:35 p.m., and Connell, having seen Appellant La Brecque inside, told Detective Graham that he had to go inside to talk to "Barry". Inside, La Brecque informed Connell that the Mexicans would only deliver half a pound; later, if everything went smoothly, they would deliver the rest of the cocaine. The Appellant La Brecque was observed leaving the restaurant. He approached the driver's side of a brown Ford sedan and spoke to its occupants. The brown Ford left the parking lot, and Appellant La Brecque returned to the restaurant.

Connell returned to the recreational vehicle and moved it to the other side of the parking lot to wait for the delivery of the cocaine. Seeing that Detective



O'Dell had arrived and parked 100 to 150 feet behind them, Detective Graham left Connell on the pretext of assisting O'Dell to count the money. After bringing O'Dell up to date, Detective Graham returned to the recreational vehicle.

Shortly thereafter, at approximately 6:50 p.m., a blue Volvo station wagon arrived on the parking lot and was parked in front of the restaurant. In the blue station wagon was Appellant Houde, the driver. He was joined by Appellant La Brecque. Connell pointed to the blue station wagon and said that the Mexicans would first go to Barry. Then Appellant La Brecque got out of the station wagon and approached the pay telephone just outside the restaurant's front door, where he dialed a number, waited a brief time, and hung up, returning to the Volvo. Within a minute, the same brown Ford sedan containing two Mexican-American males arrived on the parking lot. The Ford was parked parallel to the recreational vehicle, and two Mexican-American men got out of it and approached the Volvo. Connell said, "Here they are!"

As the men approached the Volvo, one of them lifted the front of his shirt and reached down inside his pants as though he were about to bring something out. However, Appellant La Brecque waved at the man with one hand and stopped what appeared to be about to happen. La Brecque then entered the restaurant and went directly to the restroom followed by one of the Mexican-American males. The other man remained in the restaurant looking around.

Concerned, Detective Graham instructed Connell to find out what was occurring; Connell left the recreational vehicle and approached the Volvo to ask Houde what was going on. Appellant La Brecque was in the restaurant and Connell returned, saying that "Barry" was making the pickup in the bathroom.

Having left the recreational vehicle to allegedly reassure Detective O'Dell, Detective Graham returned just as Appellant La Brecque was going through the door of the trailer. Connell said, "Come on Barry, let's do it," and La Brecque, after apologizing for the delay, pulled out a plastic bag containing one-half pound of cocaine and placed it on the counter in front of Detective Graham.

Detective Graham field tested the substance and obtained positive results for cocaine. He then asked Connell to weigh it, and agreed to a price of $14,000. When Detective Graham questioned Connell regarding the quality of cocaine, Connell referred the question to "Barry," and Appellant La Brecque stated that the cocaine was 80% pure. Detective Graham left the recreational vehicle to allegedly obtain the purchase money, and gave the signal for the arrest of the four coconspirators.

The Appellants and the attorney for the Government signed the following "Omnibus Agreement" on May 17, 1978:



"3(a) The parties agree to exchange all statements [Per 18 U.S.C. §3500(e)] and reports of statements (including written reports of investigator's interviews) of all witnesses they expect to call in its case in chief. If any, will provide five days prior to trial.

and

14(j) the parties acknowledge that any duty to disclose imposed herein is a continuing duty, and that any discoverable evidence or material becoming known during the pendency of this case will be promptly disclosed to the opposing party.

/s/ CHARLES LOUIS ROBERTS
Attorney for Defendant

/s/ JAMES W. KERR, JR.
Attorney for Government"

The case was scheduled to go to trial on June 5, 1978. The record shows that prior to May 31, 1978, Appellant had access to the agency reports of the Government, and the results of its laboratory tests of the cocaine, all in accordance with the Omnibus Agreement. On May 31, 1978, Appellants' counsel asked Government counsel for a list of Government witnesses. Government counsel replied on June 1, 1978, that he had no witnesses whose names were not in the case reports already given to Appellants' counsel, but investigation was continuing and names of any additional witnesses

would be supplied as soon as possible. On June 2nd Government counsel sent Appellants' counsel a list of witnesses which included the names of co-conspirator Connell and Jody Liggin. A statement was taken from Connell on June 1st and Jody Liggin gave a statement on June 2nd. However, copies of both statements were not given to Appellants' counsel until the first day of the trial on June 5th.

Appellants filed a motion for sanctions and a motion for continuance on June 5th, claiming that Government counsel had breached the Omnibus Agreement by failing to furnish the names of witnesses Connell and Liggin when they were known to Government counsel, and by failing to furnish copies of their statements to Appellants' counsel prior to the 1st day of the trial on June 5th. Both motions were denied by the court. The facts show that Appellants' counsel knew that Connell was going to testify as a Government witness before his name was furnished to them. Furthermore, they knew from the case report the connection Connell had with the case.

Appellants' motion for continuance was general in character. The only prejudice alleged was that "the Government received the surprise and other advantages of its lack of faith." However, the above facts show that Connell's testimony was no surprise to Appellants. They are not entitled to a reversal of their convictions in the absence of showing prejudice. See *United States v. Phillips*, 585 F.2d 745 (5 Cir. 1978). This is



true even if Government counsel did not comply with the agreement. At oral argument, Appellants' counsel were unable to point out any prejudice to their clients, and they have not alleged any. The argument that the failure to comply with the omnibus agreement constitutes a denial of due process is based on a faulty premise. As we have already said, no prejudice has been shown. Even when there has been non-compliance with the statutory mandate of the Jencks Act, this is not per se a violation of the constitution. Prejudice must be shown. This applies a fortiori to violation of an agreement.

In any event, the statements of the witnesses were Jencks Act material which, in the absence of the omnibus agreement, Government counsel would not have been required to furnish until the witnesses had testified. See 18 U.S.C. §3500(b). Appellants' counsel admitted this to be true at oral argument. The trial court could have granted a reasonable recess under 18 U.S.C. §3500(c) upon request of counsel for Appellants to examine the Jencks Act material, but they made no such request after the material was delivered to them.

The question of a continuance is traditionally within the trial court's discretion, and subject to reversal only for an abuse of discretion. *United States v. Smith*, 548 F.2d 545, 548 (5 Cir. 1977), *cert. denied*, 431 U.S. 959, 97 S.Ct. 2685, 53 L.Ed.2d 277 (1977); *United States v. Uptain*, 531 F.2d 1281, 1285 (5 Cir. 1976); *United States v. Sahley*, 526 F.2d 913, 918 (5 Cir. 1976); *United States v. Moriarity*, 497

F.2d 486, 489 (5 Cir. 1974); and *United States v. Clements*, 484 F.2d 928, 930 (5 Cir. 1973). To establish that a denial of a continuance is arbitrary, the movant must show that the denial seriously prejudiced him. *United States v. Miller*, 513 F.2d 791, 793 (5 Cir. 1975). No such prejudice has been shown in this case. We hold that there was no abuse of discretion by the trial court in denying the motion for sanctions and the motion for a continuance.

Appellants complain that the evidence was insufficient to sustain their convictions. We disagree.

Appellant Houde was convicted of conspiracy to possess cocaine with the intent to distribute, and aiding and abetting La Brecque's possession of cocaine. Appellant La Brecque was convicted of the same conspiracy, and also of the completed substantive offense. He challenges only the sufficiency of the evidence on the conspiracy count. Because the question of the sufficiency of the evidence is the same on all three counts as to both Appellants, they will be considered together.

It is well settled that where a jury has rendered a verdict of guilty, the evidence sustaining that verdict must be examined in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Also, it has been held that all reasonable inferences and credibility choices must be made in favor of the jury verdict. *United States v. Prout*, 526 F.2d 380, 384 (5 Cir. 1976), *cert. denied*, 429 U.S. 840,



97 S.Ct. 114, 50 L.Ed.2d 109 (1976); *United States v. Black*, 497 F.2d 1039, 1041 (5 Cir. 1974); and *Gordon v. United States*, 438 F.2d 858, 867 (5 Cir. 1971), *cert denied*, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 56 (1971). We held in *United States v. Placios*, 556 F.2d 1359, 1364 (5 Cir. 1977):

> "The standard for review of the sufficiency of evidence to support conviction is the same whether the evidence is direct or circumstantial. See *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *United States v. Warner*, 441 F.2d 821 (5 Cir. 1971), cert. denied 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58."

To prove the conspiracy, the Government had to establish the existence of an agreement by two or more persons to combine efforts for an illegal purpose, and, while this Court has frequently stated that an overt act by at least one of those persons in furtherance of that agreement is required, no overt act need be alleged or proved in prosecuting a drug conspiracy under 21 U.S.C. §846 or §963. *United States v. Thomas*, 567 F.2d 638, 641 (5 Cir. 1978); *United States v. Palacios, supra*, 556 F.2d at 1364, n. 9; *United States v. Beasley*, 519 F.2d 233, 247 (5 Cir. 1975), vacated and remanded on other grounds, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d 201 (1976). Proof of the illegal agreement or common purpose may rest upon either direct evidence or upon inferences drawn from relevant and competent circumstantial evidence. *United States v. Warner, supra.*

The Government's evidence in the instant case contains no proof of an expressed agreement to commit the offenses charged. However, direct proof of a formal agreement is not necessary to establish a conspiracy whose " 'existence often is proven by inferences from the actions of the actors or circumstantial evidence of a scheme'." *United States v. Riggins*, 563 F.2d 1264, 1267 (5 Cir. 1977), quoting, *United States v. Amato*, 495 F.2d 545, 549 (5 Cir. 1974), *cert. denied*, 419 U.S. 1013, 95 S.Ct. 333, 42 L.Ed.2d 286 (1974). As this Court stated in *United States v. Jacobs*, 451 F.2d 530, 535 (5 Cir. 1971), *cert. denied*, 405 U.S. 995, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972):

> "Persons who enter into a conspiracy to commit a criminal offense do not do so openly, and generally a conspiracy can be established only by evidence of the attendany circumstances and the concerted acts and conduct of the alleged conspirators and the inferences reasonably deducted therefrom that logically and consistently warrant the conclusion that an unlawful agreement, expressed or implied, existed."

See also, *Park v. Huff*, 506 F.2d 849, 860 (5 Cir. 1975), *cert. denied*, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975); *United States v. Ryan*, 478 F.2d 1008 (5 Cir. 1973); *United States v. Harvey*, 464 F.2d 1286 (5 Cir. 1972), *cert. denied*, 410 U.S. 938, 93 S.Ct. 1399, 35 L.Ed.2d 604 (1973); *United States v. Sutherland*, 463 F.2d 641 (5 Cir. 1972), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972).



Applying these principles to this case, we agree with Government's counsel that the following facts, which we repeat, prove that the evidence was sufficient to sustain the convictions of Appellants.

The evidence showed that while Appellant La Brecque asked co-conspirator Connell to find buyers for cocaine, it was Appellant Houde who supplied the cocaine once the purchaser was found. The joint involvement of Appellants is further established by their appearance together at Connell's house after he returned from Denver and was supposed to have the $24,000 that was due Appellants for the cocaine. While both Appellants appeared at Connell's house, it was Appellant Houde who made the telephone call attempting to locate Connell and the $24,000. When Appellants Houde and La Brecque learned that the money was not forthcoming and some of the cocaine was adulterated, they jointed decided to raise what money they could to pay the debt to their Mexican supplier. It was Houde who was kidnapped and La Brecque and Connell bailed him out through partial payment to the Mexicans.

With respect to the dealings with Dave Anderson, it is undisputed that Appellant Houde and Appellant La Brecque were jointed present at the delivery site, that they were there together in Appellant Houde's car, and that when questioned by Connell, Houde informed him that La Brecque was taking delivery of the cocaine in the restroom of the restaurant. Shortly thereafter,

Appellant La Brecque left the restaurant and delivered one-half pound of cocaine to Detective Graham.

The joint meetings of Houde and La Brecque that were essential to the continuing conspiracy, their manner their conversations with Connell and the agents, and the actual delivery of cocaine proved that Appellants were working actively and in concert to possess cocaine with the intent to distribute it to Detective Graham. Further, each was present, either singularly or collectively, at various crucial stages of the negotiations when cocaine and various narcotic transactions were discussed. We hold that the evidence supports the decision of the jury that Houde and La Brecque were guilty beyond a reasonable doubt of the conspiracy as charged.

The Appellant La Brecque was convicted of the substantive offense of possessing cocaine with the intent to distribute it. He does not challenge the sufficiency of the evidence on this count, although he did contest the sufficiency of the evidence on the conspiracy charge, as shown above. Appellant Houde was convicted of aiding and abetting La Brecque's possession of cocaine with intent to distribute it. He challenges the sufficiency of the evidence on this charge.

The evidence showed that Appellant Houde was an active participant, aiding and abetting Appellant La Brecque in possessing the cocaine with intent to distribute it to Detective Graham. It will be recalled that



the debt owed to the Mexicans who were Appellant's source of supply was jointly that of Connell, Houde, and La Brecque, and that Houde had much to gain by insuring the possession of the cocaine by La Brecque and its distribution to Detective Graham so that money could be obtained to liquidate the debt to the Mexicans.

Before one can be convicted under the law of principals, it is necessary to prove that he aided or abetted the commission of a federal crime by another. In making such proof, it is only necessary for the prosecution to show that the defendant in some way " 'associate[d] himself with the venture, that he participate[d] in it as in something he wishe[d] to bring about, and that he [sought] by his action to make it succeed.' L. Hand, J., in *United States v. Peoni*, [, 2nd Cir.] (CCA 2d NY) 100 F.2d 401, 402." *Nye and Niessen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949); and, *United States v. Trevino*, 556 F.2d 1265 (5 Cir. 1977). Houde's participation in the substantive offense was clearly proven in the instant case. The proof of this fact was more than sufficient to meet the required test. See *United States v. Baldarrama*, 566 F.2d 560 (5 Cir. 1978).

The Appellants complain of five instances where they objected to the closing argument of the prosecutor as being prejudicial, and which they contend denied them a fair trial. The trial judge overruled some of the objections and sustained others. However, in each instance, the judge gave appropriate instructions to the

jury regarding the argument. We have examined the argument of the prosecutor and the instructions of the court and have concluded that if there was any error, which is doubtful, such error was adequately cured by the instructions of the court. See *United States v. Morris*, 568 F.2d 396, 402 (5 Cir. 1978); and *United States v. Arteaga-Limones*, 529 F.2d 1183, 1191 (5 Cir. 1976), *cert. denied*, 429 U.S. 920, 97 S.Ct. 315, 50 L.Ed.2d 286 (1976).

It is well settled that the test to be applied is whether the prosecutor's argument, taken as a whole and in the context of the entire case, prejudicially affected the substantial rights of Appellants. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); and *United States v. Rodriquez*, 503 F.2d 1370 (5 Cir. 1974). We hold that, considering the curative charges of the court to the jury, the substantial rights of the Appellants were not prejudicially affected by the argument of the prosecutor. He was entitled to make a fair response to the argument of defense counsel and to comment on the evidence. In our opinion his remarks in this case were in line with the principle of fair reply. *United States v. Hiett*, 581 F.2d 1199, 1204 (5 Cir. 1978). Furthermore, at the conclusion of the arguments, the trial judge invited Appellants' counsel to submit any further curative instructions regarding the argument to which they had objected, but counsel did not submit any such requested instructions.

Finally, Appellants complain that the trial court should not have imposed special parol terms after they



were convicted of narcotics violations. However, Appellants concede that this court previously held that a special parole term was properly applied to a 21 U.S.C. §846 sentence in *United States v. Dankert*, 507 F.2d 190 (5 Cir. 1975).[1] They ask that we re-examine and re-evaluate our prior holding in this regard. We are without authority to overrule a decision of a prior panel of this court on the same question. See *United States v. Hernandez*, 580 F.2d 188, 191 (5 Cir. 1978), affirmed and remanded for resentencing, 591 F.2d 1019 (5 Cir. *en banc*, 1979). Furthermore, we conclude that a special parole term after conviction of a narcotics offense is proper under the statute.

Accordingly, the convictions of Appellants are affirmed.

AFFIRMED.

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1 This decision has now been followed by the Second Circuit in *United States v. Wiley*, 519 F.2d 1348, 1351 (2 Cir. 1975), *cert. denied, sub nom. James v. United States*, 423 U.S. 1058, 96 S.Ct. 793, 46 L.Ed.2d 648 (1976); the Eighth Circuit in *United States v. Rich*, 518 F.2d 980, 986-987 (8 Cir. 1975), *cert. denied*, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976); and the Tenth Circuit in *United States v. Jacobson*, 578 F.2d 863 (10 Cir. 1978).

## APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

August 20, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5453 — U.S.A. v. TIMOTHY RICHARD HOUDE and BARRY ALAN LABRECQUE

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
CLERK, U.S. COURT OF APPEALS

/s/ Sally Hayward
Deputy Clerk

cc: Messrs. Joseph Abraham, Jr.
Charles Louis Roberts
Ms. Leroy Morgan Jahn

Supreme Court, U. S.
FILED
NOV 9 1979
MICHAEL RODAK, JR., CLERK

No. 79-462

# In the Supreme Court of the United States

OCTOBER TERM, 1979

TIMOTHY RICHARD HOUDE AND BARRY ALAN LABRECQUE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-462

TIMOTHY RICHARD HOUDE AND BARRY ALAN LABRECQUE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners contend that the district court erred in denying their motion for a continuance after the government, contrary to a pretrial agreement, did not provide statements of two witnesses until the first day of trial.

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner LaBrecque was sentenced to consecutive terms of nine years' imprisonment and nine years' special parole on each count; petitioner Houde was sentenced to consecutive terms of seven years' imprison-

ment and seven years' special parole on each count. The court of appeals affirmed (Pet. App. 1a-19a).

a. The evidence, the sufficiency of which petitioners do not dispute, is set forth in detail in the opinion of the court of appeals (Pet. App. 2a-8a). In brief, it showed that in March 1978 petitioners obtained a large quantity of cocaine, which co-conspirator Connell agreed to sell. Connell's girlfriend, Liggin, flew from El Paso to Seattle to sell the cocaine, but the transaction fell through. Upon Liggin's return to El Paso, it was discovered that some of the cocaine was missing. The cocaine had been delivered to petitioners without prepayment, and they and Connell decided to share responsibility for raising the money still owed to their source of supply. Subsequently, Connell was contacted about a cocaine purchase by Gary Graham, an undercover detective with the Denver Police Department. At Connell's request, petitioner LaBrecque approached the cocaine supplier, who agreed to advance another quantity of cocaine to enable the conspirators to repay the balance due on the original transaction. After lengthy negotiations, Connell delivered a half-pound of cocaine to Detective Graham on April 26, 1978, at which time petitioners were arrested.

b. On May 17, 1978, petitioners and the government agreed that the parties would exchange all witness statements five days prior to trial. On May 31, in accordance with the agreement, petitioners were given access to the government's case reports and results of the laboratory tests of the cocaine. That same date, petitioners requested a list of government witnesses. On June 1, the government replied that there were no witnesses whose names did not appear in the case reports already provided, but that names of any additional witnesses uncovered in the ongoing investigation would be



disclosed as soon as possible (Pet. App. 9a-10a). On June 2, the government supplied petitioners with a list of witnesses that included the names of Liggin and co-conspirator Connell. However, although Connell and Liggin gave statements on June 1 and June 2, respectively, copies of these statements were not provided to petitioners until June 5, the first day of trial (*id.* at 10a).

Petitioners moved for sanctions and for a continuance, claiming that the government had breached the pretrial agreement by failing to furnish the names of witnesses Connell and Liggin when they became known to the government and by failing to provide copies of their statements until the first day of trial. The district court denied both motions (Pet. App. 10a).

2. Petitioners contend (Pet. 15-23) that because the government violated the pretrial agreement, the district court erred in denying their motions for a continuance or for sanctions.

We acknowledge that when the government enters into a discovery agreement, it is under a duty to comply with it. *United States* v. *Rodarte*, 596 F. 2d 141, 145 (5th Cir. 1979); *United States* v. *Phillips*, 585 F. 2d 745, 747 (5th Cir. 1978); *United States* v. *Scanland*, 495 F. 2d 1104, 1106 (5th Cir. 1974). However, breach of such an agreement is not grounds for relief in the absence of a showing of prejudice. *United States* v. *Phillips*, *supra*.[1]

[1] *United States* v. *Millet*, 559 F. 2d 253 (5th Cir. 1977), upon which petitioners rely (Pet. 17), is not to the contrary. There the court observed in dictum that noncompliance with a discovery agreement would be "a serious breach of the Government's duty, as well as a *possible* violation of a defendant's constitutional due process rights" (559 F. 2d at 257; emphasis added). As the court below correctly noted (Pet. App. 11a), in the absence of prejudice there is no due process violation.

The breach here was only that the government provided the names of Connell and Liggin three days before trial, rather than five days before, and that it failed to provide the statement of those witnesses until the day of trial, rather than five days before. As the court of appeals noted (Pet. App. 11a), petitioners have been unable to specify any prejudice that they incurred as a result of this rather minor transgression.[2]

The only prejudice that petitioners alleged before the trial court was that " 'the Government received the suprise and other advantages of its lack of faith' " (Pet. App. 10a). However, petitioners knew that Connell was going to testify before the prosecution gave them his name, and petitioners knew, from having read the case report, of Connell's connection to the case (*ibid.*). The court of appeals thus correctly concluded that the testimony came as "no surprise" to petitioners (*ibid.*). Finally, because the government did provide the witnesses' statements at the beginning of trial, it more than met its obligation under the Jencks Act, 18 U.S.C. 3500(b), to do so only after the witnesses testified.[3]

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[2]Furthermore, Connell and Liggin did not even make the statements at issue until four and three days before trial, respectively.

[3]This case is thus unlike *United States* v. *Roybal*, 566 F. 2d 1109 (9th Cir. 1977), upon which petitioners rely (Pet. 22). In *Roybal*, the government, in violation of a discovery order, failed to disclose information it intended to bring out through an informant; "[i]nstead, it waited until the informant was on the witness stand and then adduced the information without any warning to [defendant]" (566 F. 2d at 1110). Petitioners' reliance (Pet. 22) on *United States* v. *Nobles*, 422 U.S. 225 (1975), is likewise misplaced. In *Nobles*, defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements the investigator had previously obtained from the witnesses. When defense counsel advised that he did not intend to comply with the court's order to produce the report at the completion of the



In these circumstances, it cannot be said that the denial of the continuance was "so arbitrary as to violate due process." *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). The court of appeals therefore correctly held "that there was no abuse of discretion by the trial court in denying the motion for sanctions and the motion for a continuance" (Pet. App. 12a).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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investigator's direct testimony, the court refused to allow him to testify, a sanction which this Court upheld. Thus, contrary to petitioners' assertion, that case did not involve imposing sanctions against a defendant for failure "to timely provide the Government with a report" (Pet. 22), but rather for a refusal to provide it at all. And, as this Court noted, "[t]he District Court did not bar the investigator's testimony. It merely prevented [the defendant] from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights" (422 U.S. at 241; citation omitted).

[4]Petitioners also argue (Pet. 23-25) that the district court wrongly denied them an evidentiary hearing on the motion for a continuance "by the curious plot of stipulating to the breach and the prejudice" (Pet. 23) and that the court of appeals was therefore bound by that stipulation. It is evident, however, that in rejecting petitioners' claims, the court of appeals justifiably relied on counsel's concessions at oral argument, where counsel "were unable to point out any prejudice to their clients, and * * * [did] not allege[] any" (Pet. App. 11a). Even now, petitioners do not specify how the asserted breach prejudiced their defense, nor what evidence they would have presented to establish such prejudice had the court held a hearing. Accordingly, the district court's failure to hold a hearing does not warrant reversal.